
**STRENGTHENING INTERNATIONAL GOVERNANCE FOR SUSTAINABLE
DEVELOPMENT: EXPECTATIONS FOR THE 2002 JOHANNESBURG WORLD SUMMIT**

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STRENGTHENING INTERNATIONAL GOVERNANCE FOR SUSTAINABLE DEVELOPMENT: EXPECTATIONS FOR THE 2002 JOHANNESBURG WORLD SUMMIT^{*}

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1 Introduction

Ten years after the Rio Conference, the world is confronted with the challenges of epidemic poverty, unsustainable lifestyles and environmental degradation. It is up to the coming Johannesburg Summit to bridge this gap with renewed political will, practical steps and partnerships to promote sustainable development.

Among the issues expected to be clearly in focus of the Summit is strengthening governance for sustainable development, particularly at the international level.

During the broad preparatory process for the Summit there was common understanding that Johannesburg should become the starting point for establishing a more effective "international environmental governance". However, there is still controversial debate on how to achieve the aim of better governance. In my view, four complementary strategies should be pursued:

- the relevant international institutions and their financial base should be strengthened;
- the various international environmental treaty-making and treaty-implementation processes should be better harmonised or, at least, coordinated;
- the civil society's role should be strengthened; and
- the local Agenda 21 processes should be expanded and intensified.

^{*} Guest lecture delivered on 15 May 2002 at the faculty of law, Potchefstroom University for CHE.

2 The enhancement of international environmental institution-building

The question of enhancing international environmental institution-building is at the core of current debate on establishing good international environmental governance.

I shall concentrate my deliberations on two reform options:

- establishing a new global environmental organisation; and
- strengthening the United Nations Environment Programme (UNEP) as the principal United Nations body in the field of the environment.

3 A new global environmental organisation

As to the first option, an ever-increasing number of voices is currently demanding the establishment of a Global Environmental Organisation (GEO) with which the existing UNEP could merge. Such an organisation is supposed to have the capacity to effectively address wide-ranging environmental threats in an ever more globalised world and to become an environmental counterweight to the WTO. This idea is certainly attractive, but can, at best, be realised in the long run. Consequently, the debate during the Summit should concentrate on discussing ways and means of strengthening and restructuring UNEP. Whether this might finally result in the latter's upgrading to a World Environment Organisation, possibly with the status of a fully-fledged UN specialised agency, remains to be seen.

4 Strengthening UNEP

As to the second option, there is common understanding that UNEP should continue to play its leading role in the field of international environmental action. However, UNEP will undoubtedly be unable to do so unless its internal structure and financial base are considerably strengthened.

UNEP was established as a result of the UN Conference on the Human Environment held in Stockholm in 1972. Determined to provide a forum for the international community to address major and emerging environmental policy issues, the UNEP Governing Council generally meets every two years, with special meetings sometimes convened between its ordinary meetings. The Governing Council consists

of the governmental representatives of 58 States that serve four-year terms on the basis of equitable geographic distribution.¹ UNEP's responsibilities include:

- promoting international environmental co-operation and recommending policies to achieve this;
- providing policy guidance for the direction and co-ordination of environmental programmes in the UN system;
- reviewing the state of the global environment; and
- promoting the contribution of relevant scientific and other professional communities to the acquisition, assessment and exchange of environmental knowledge and information.

Among the most important achievements of the UNEP Governing Council is certainly the initiation and sponsoring of negotiations on many multilateral environmental agreements (MEAs), such as last year's Persistent Organic Pollutants (POP) Convention.

In May 2000 the first Global Ministerial Environment Forum (GMEF) met in Malmö, Sweden. The purpose of the Forum was to institute a process for regaining policy coherence in the field of the environment, in response to a call for such action in the 1998 report of the UN Secretary-General on environment and human settlements. The Forum adopted the Malmö Ministerial Declaration which stated that the coming World Summit on Sustainable Development in Johannesburg should review the requirements for a greatly strengthened institutional structure for international environmental governance. Such review should be based on an assessment of future needs for an institutional architecture that has the capacity to address the complex and wide-ranging environmental problems we face today. Meanwhile, the

1 Members to UNEP are 16 African, 13 Asian, 13 Western European and others, 10 Latin American and Caribbean, and 6 Eastern European States.

GMEF together with the UNEP Governing Council met three times, the last meeting being held in February 2002.

Thus, it appears that UNEP's governance structure is currently undergoing a process of substantial change. About two years ago it became bifurcated. The UNEP Governing Council and the GMEF constitute one intergovernmental policy body as envisaged in General Assembly Resolution 53/242. Par 6 thereof states that the Governing Council will constitute "the forum in the years that it meets in regular session and, in alternate years, with the GMEF taking the form of a Special Session of the Governing Council".

Most recently, the President of the UNEP Governing Council emphasised² that the UNEP Governing Council, together with the GMEF, is supposed to ensure broad participation of member States of the United Nations and its specialised agencies in its work. The President suggested that "increased membership, allowing for universal participation in global environmental decision-making, could be accomplished by a resolution of the General Assembly and would increase the sense of ownership among Member States, enhancing the authoritative basis for its decisions...".³

In February 2002, at its Cartagena meeting, the Open-ended Intergovernmental Group of Ministers on International Environmental Governance recommended, in its Final Report on International Environmental Governance, to ensure universal participation, as opposed to universal membership, of UN State members in the work of the Governing Council/GMEF. It further stressed that the latter should meet every other year at UNEP headquarters in Nairobi, with meetings to be held in alternate years in other UN regions.

2 See his Draft Report, issued on 25 January 2002 (UN Doc. UNEP/IGM/5/2) and tabled for consideration by the Open-ended Intergovernmental Group of Ministers on International Environmental Governance (a body established a year ago by the UNEP Governing Council in terms of its Decision 21/21).

3 Ibid. p 6 et seq.

What are the pros and cons of this newly shaped structure of UNEP? It was certainly a serious handicap that, until recently, the UNEP Governing Council hampered effective ministerial participation and continuity in governance. Now it is supposed to share its governance role with the newly established GMEF, functioning as an additional UNEP policy organ that is expected to provide broad overarching policy advice. The GMEF is determined to meet annually at ministerial level. But, there is still controversial debate on the question whether the GMEF, as opposed to the Governing Council, is to be organised as a body with universal membership.

Apart from this, neither the underlying rationale nor the modalities of interaction between the Governing Council and the GMEF are sufficiently clear.⁴ There are doubts whether such a mix of bodies, with their somewhat indeterminate powers, may be an appropriate medium for strengthening UNEP's governance capabilities. There exists a fear that giving UNEP a bifurcated governance structure will result in making the decision-making process of UNEP more cumbersome and less transparent than before. That is why I favour a restructuring of the UNEP Governing Council in the following way: It should continue to function as a non-plenary organ with clear-cut decision-making powers. It should meet at ministerial level.⁵ Considering its broad range of tasks, it should function continuously in the future. And, finally, it should be assisted by a high-level intergovernmental body for providing broad overarching environmental policy advice. The GMEF might function as such a body, but considering that with the Commission on Sustainable Development (CSD) such type of body already exists within the UN system, I doubt whether the GMEF is really needed. I shall return below to the role that the CSD is determined to play in this regard.

4 Rather undetermined is also the relationship of the Governing Council and GMEF with the recently established Environmental Management Group (EMG) designed for enhancing inter-agency co-ordination in the field of environment and human settlement. There are even doubts whether such an additional body is needed, since voluntary self-commitment of the bodies concerned, laid down in so-called "memoranda of co operation", appears to be adequate for achieving inter-agency co-ordination.

5 Thus, UNEP's Governing Council should be organised along the lines envisaged for the UN Security Council in Art. 28 par 1 of the UN Charter.

UNEP's role continues to fall short of the expectations expressed in the 1997 Nairobi Declaration primarily because UNEP remains hampered by insufficient and unpredictable financial resources. Considering that the current voluntary arrangements for the UNEP Environmental Fund appear to be inadequate, UNEP should be given direct financial support from the UN regular budget to meet the costs of the administration of the UNEP secretariat. Furthermore, it cannot be accepted that UNEP has to compete with multilateral environmental agreements for the same funding.⁶ However, there is still some controversy on the strategies required to ensure predictable and stable funding for UNEP.

Proposals for up-grading UNEP to a UN specialised agency financed through a system of binding assessed contributions by member States would require the adoption of a new charter for UNEP. That being the case, this can be only viewed as an option in the longer term.

According to a recent proposal of the President of the UNEP Governing Council, governments should consider the establishment of a system of negotiated or "voluntary agreed" scale of assessments for the UNEP's Environment Fund along the lines of the system of contributions made to some multilateral environmental agreements. A possible starting point in developing such a system could be guided by the UN scale of assessment, given that this is an established indicator of the economic and social situation in the UN member States, and thus of their capacity to make contributions to the UN programmes. In the opinion of the President of the UNEP Governing Council, another option would be that of drawing a distinction between "administrative costs" and "programme/operational costs". In such a scenario

5 The Global Environment Facility (GEF) is certainly the leading multilateral funding mechanism for global environmental protection and sustainable development. It should retain that lead in the future. Any extension of its domain of action will necessarily depend on whether its resources will be adapted accordingly. The GEF Assembly in 2002 will offer an opportunity to enhance the mandate of GEF as the main sustainable development financial mechanism and to replenish its resources. However, the conferences of parties to multilateral agreements should continue to have the final say in matters of policy, strategy, programme priorities and eligibility criteria concerning access to, and utilisation of, the resources of the mechanism. The responsibility of the Facility should thus remain limited to putting such guidance in operation.

the latter would be funded by the UNEP Environment Fund, whereas “administrative costs” would be borne by the UN regular budget.

The aforementioned Open-ended Intergovernmental Group of Ministers on International Environmental Governance, at its most recent meeting in Cartagena, has endorsed these proposals. But, we must wait and see whether the governments represented at the World Summit in Johannesburg will be prepared to make such funding arrangements.

5 Relationship between UNEP and the CSD

Let me now address the crucial relationship between UNEP and the Commission on Sustainable Development (CSD), both of which are involved in sustainable development at UN level. At times their relationship appears to be characterised by rivalry rather than partnership. It must therefore be shaped anew in such a way that both bodies will be able to direct complementary efforts aimed at achieving sustainable development, thereby avoiding duplication of work and inconsistencies in their activities. The question is how this should be done.

It has been submitted that the respective mandates of UNEP and the CSD are substantially different. UNEP is conceived of as a body that is primarily responsible for environmental protection, while the CSD engages in the promotion of sustainable development.⁷ In my view, the acknowledgement that environmental protection and development are equally important integral components of the overall aim of sustainable development clearly contradicts such an understanding. Both institutions must foster environmental protection and development as a uniform endeavour urgently requiring integrated solutions. This can be done, I believe, by effecting a pragmatic division of work at functional and operational levels.

7 This is e.g. the position of the EU States.

In this regard the CSD should concentrate on opening up new problem areas for law making. It should do this by determining issues that may be made the subject of treaty negotiations under the auspices of UNEP. Moreover, the CSD should continue to be a high-level forum for information and discussion of environmental, developmental, social and economic issues. Its services must be available to all environmental role players, with the inclusion of NGOs.

UNEP, in turn, should continue to concentrate on sponsoring, and taking care of, multilateral treaty making processes. It should intensify its endeavours to improve the implementation and further development of all conventions created under its auspices by offering an adequate co-ordination mechanism to the respective secretariats of these conventions. Furthermore, UNEP should continue to develop “soft law” instruments, such as guidelines for environmental and developmental conduct. Finally, it should assume a catalytic role in the area of technology transfer and capacity building.

The more UNEP grows in its role as a body committed to sustainable development, the less UNDP will be involved in environmental affairs. As regards its relationship with the Global Environment Facility and the World Bank, UNEP should attempt to co-ordinate its activities with those of the latter by entering into “memoranda of co-operation”.

6 Multilateral environmental agreements

Part of the discussion on establishing good international environmental governance turns upon the question how to enhance the making and implementation of multilateral environmental agreements.

Let me first address the option of high-level centralisation of the relevant lawmaking processes.

Establishing an overall agreement on environmental protection and sustainable development at United Nations level, such as the World Conservation Union’s Draft Covenant on Environment and Development, is certainly not the way out of the

dilemma of a seriously fragmentary treaty-making process. It is an illusion to believe that such an instrument will have any substantially uniting or superseding effect. On the contrary, it could even have a detrimental effect, such as paralysing relevant inter-State initiatives and slowing down or bureaucratising international treaty making.

Instead of being centralised at UN level, environmental law making should continue to be decentralised, while being directed at future integration. Up to the present time, international environmental treaty making has been rather disorganised. In future any unnecessary proliferation and diversification of international environmental agreements should be avoided, because it entails the risk of further treaty congestion, generation of overlaps or conflicts of norms. Moreover, the more negotiation processes run, the less developing countries are adequately represented therein. That is why, first and foremost, the existing environmental treaty regimes must be strengthened and further developed. With the Geneva Convention on Long-range Trans-boundary Air Pollution, the Climate Change Convention, the Bio-diversity Convention, and others, a number of framework conventions exist that, together with subsequent protocols, provide a solid basis for developing dynamic international environmental protection regimes.

There is, for instance, continuing debate on what kind of instrument should be established at international level for providing adequate protection of forests. In my view, a special protocol on forest protection within the framework of the Bio-diversity Convention would be preferable to a separate convention. An independent regime of forest protection might, conceivably, conflict with the provisions of the Bio-diversity Convention, whereas a protocol developed under the latter's umbrella would offer an integrated solution to the problem.

A second question arising in this context is whether there are ways and means of achieving more convergence between multilateral environmental agreements (MEAs). Current international environmental treaty practice is rather heterogeneous. Even today most treaties pursue a sectoral approach to addressing environmental issues. They are designed to protect one particular environmental medium without addressing others. Thus, it does not come as a surprise that to date we face a

number of instruments showing hidden inconsistencies or even blunt discrepancies. The issue is how to reconcile these divergences.

With regard to treaties that are similar in structure and pursue closely related goals, a clustering approach with the aim of achieving convergence or even synergy among them should be sought. This can best be achieved by a harmonised interpretation of both instruments, provided their wording allows it.

The following example may illustrate this approach. The international wildlife conservation treaties concluded during the 1970s are rigidly directed at preserving threatened species by keeping them in specially protected areas or banning trade therein. None of these instruments appears to be inspired by the idea that the species' survival is possibly best secured when the custodial States and their local communities living with wildlife are allowed to make use of it in a sustainable manner.

How can this inadequacy be cured? A closer look at the instruments of the 1970s reveals that their objectives are essentially related to those of the 1992 Convention on Biological Diversity (CBD). This convention serves as an umbrella for all earlier bio-diversity related instruments, including the wildlife conservation treaties of the 1970s.⁸ Due to the fact that the CBD fosters the concept of "sustainable use" as a viable means to preserve biological diversity, the States that are parties to the wildlife conservation treaties appear to be allowed, if not required, to interpret and implement these treaties anew with reference to "sustainable use". Consequently, this concept can be taken as the key for pursuing a conservation strategy of combining ecological and economic endeavours.

8 Among them are in particular the Convention on Wetlands of International Importance (Ramsar) of 1971 and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973.

Any harmonised interpretation or implementation of closely interrelated international environmental agreements should be accompanied by the employment of adequate inter-institutional co-operation mechanisms aimed at optimising the processes of implementation and further development of the respective agreements. The secretariats of, and conferences of the parties to, such agreements should co-operate fully in pursuing this aim by taking joint action or by co-ordinating their respective endeavours as closely as possible. Co-location of the secretariats may ease such efforts and enhance administrative links and communication.

MEAs pursuing related goals are particularly susceptible to inter-institutional co-operation. This is shown by the fact that the secretariat of the CBD has entered into a number of “memoranda of co-operation” with the secretariats of wildlife conservation conventions. An example may be found in a memorandum to the effect that the secretariats of the CBD and the Ramsar Convention have established a joint working plan that includes a range of cooperative actions. It nourishes hopes that such “memoranda of co-operation” will not remain dead letter.

In my view, UNEP is called upon to continue and intensify its efforts to enhance the synergies and linkages between MEAs with comparable areas of focus by prompting the MEA secretariats to enter into appropriate coordination arrangements and giving them full logistic support in this respect.

7 The role of civil society and NGOs

Civil society can give a significant impulse to the process of establishing good governance in the field of international environmental protection and sustainable development. It should play a two-fold role. Firstly, embodying the environmental conscience of the world and advocating the fundamental interests of present and future generations,⁹ civil society should develop as a distinct counterpart of the community of States. Secondly, NGOs representing civil society should become increasingly reliable partners to States in all fields of environmental and developmental co-operation.

NGOs are already involved in the international law-making process and in the implementation and enforcement of law. In the latter area, States should be better prepared to accept NGOs as parties, or at least as *amici curiae*, in proceedings before international judicial and quasi-judicial bodies, provided the NGOs concerned have appropriate international standing.

States should lean towards intensifying this partnership, as many NGOs have considerable knowledge and expertise in environmental and developmental matters. States should, however, be empowered to make a selective choice among the mass of NGOs operating at international level. They should accept as partners only those NGOs which meet certain qualitative requirements, such as a representative character, own affectedness or legitimacy to act on behalf of affected third persons, specific skills and expertise in environmental and developmental affairs and, finally, accountability for actions taken.

8 The role of local governments

Let me close by saying a few words on the role of local governments in the process of establishing good international environmental governance.¹⁰

Local action moves the world! Having in mind this message, there is much in favour of the assumption that local governments are key components of national sustainable development strategies if such plans are to succeed. As a matter of fact, local governments have responded actively to Agenda 21, particular chapter 28 thereof, through the widespread adoption of local Agenda 21 processes. Since 1992 more than 6200 local governments in over 100 countries have established such processes. In the sphere of climate

9 The Earth Charter, adopted by the Earth Council in March 2000, reflects this kind of commitment.

10 See for a more detailed discussion: Multi-stakeholder dialogue segment of the second session of the Commission on Sustainable Development acting as the preparatory

protection many local governments have succeeded in reducing their greenhouse gas emissions, improving local water and air quality and increasing sustainable transportation and efficient energy use. By means of Agenda 21 processes, local governments have established formal partnerships with major groups, ethnic minorities, community-based groups, as well as with international agencies, national governments and other local governments to accelerate sustainability.

Supporting the direct engagement of local and sub-national institutions from around the world in international activities and partnerships, thereby fostering international solidarity, is an important component of good international environmental governance. Therefore, relevant actions of local governments deserve to be fully supported.